STATE OF MICHIGAN

COURT OF APPEALS

MACOMB COUNTY, MACOMB COUNTY ROAD COMMISSION and 16TH JUDICIAL CIRCUIT COURT, Respondents-Appellants,	FOR PUBLICATION September 20, 2011
v	No. 296416 MERC
AFSCME COUNCIL 25 LOCALS 411 and 893, INTERNATIONAL UNION UAW LOCALS 412 and 889, and MICHIGAN NURSES ASSOCIATION, Charging Parties-Appellees.	LC Nos. 07-000083 07-000086 07-000087 07-000115 Advance Sheets Version

Before: MARKEY, P.J., AND FITZGERALD AND SHAPIRO, JJ.

MARKEY, P.J. (*dissenting*).

I respectfully dissent. I conclude that respondents did not commit an unfair labor practice (ULP) when the Macomb County Retirement Commission adopted new mortality tables to ensure that optional retirement benefits that include payment to a surviving beneficiary are the actuarial equivalent of the negotiated defined-benefit straight-life pension. I would hold that the retirement commission is vested with the authority to determine mortality tables and actuarial assumptions necessary to ensure "actuarial equivalence" of optional retirement benefits, and that the matter is not subject to mandatory bargaining under the public employment relations act (PERA), MCL 423.201 *et seq*. But even if it is, the matter was "covered by" the parties' collective bargain agreements (CBAs); consequently, respondents satisfied their duty to bargain in good faith. I would also hold that the Michigan Employment Relations Commission (MERC) erred by ruling that the parties had tacitly amended the clear and unambiguous language of the parties' contracts. The MERC's finding is not supported by competent, material, and substantial evidence on the whole record. I conclude that it is a substantial and material error of law. Because this Court cannot cure these errors by conducting its own fact-finding under the higher standard required to overcome the clear and unambiguous terms of the parties' CBAs, I would reverse and remand for dismissal of the ULP charges.

I. ANALYSIS

Respondents assert three arguments on appeal. First, respondents argue that the hearing referee correctly determined that respondents had satisfied their duty to bargain in good faith because the matters the charging parties wished to negotiate were already "covered by" the CBAs. Second, respondents contend that the MERC's decision is unsupported by evidence or legal authority and that the mistaken overpayment of optional benefits with rights of survivorship greater than the "actuarial equivalent" of a straight-life benefit cannot tacitly amend the unambiguous language of the CBAs or the Macomb County Employees' Retirement System Ordinance (the retirement ordinance or the ordinance). Respondents assert that, at best, the charging parties have alleged a breach of a disputed term of the CBAs for which the contract remedy of arbitration is available. Finally, respondents argue that they have no duty to bargain over actuarial assumptions that are within the sole discretion of the commission and that such bargaining might threaten the financial integrity of the pension system. The commission, respondents assert, must be able to determine actuarial assumptions to fulfill its statutory fiduciary duty to maintain the financial integrity of the pension system. Respondents argue that actuarial equivalence cannot have varying bargained definitions and that the determination of actuarial assumptions to ensure that optional benefits are the actuarial equivalent of bargained defined benefits is a fiduciary responsibility vested in the commission by both the ordinance and the CBAs. I agree.

A. MANDATORY BARGAINING

The primary question presented in this appeal is whether the actuarial assumptions made to ensure that optional forms of benefit payments are the actuarial equivalent of straight-life retirement benefits determined under the terms of the CBAs are subject to mandatory bargaining under PERA. The hearing referee, the MERC, and the majority reject respondents' contention that they have no duty to bargain over actuarial assumptions because they lacked control over the issue, citing *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44; 214 NW2d 803 (1974), and *Detroit Police Officers Ass'n v Detroit*, 212 Mich App 383; 538 NW2d 37 (1995), aff'd 452 Mich 339 (1996). I agree that respondents cannot on the basis of lack of control over the retirement commission, avoid *their* duty to bargain in good faith *if* the actuarial assumptions at issue are mandatory subjects of collective bargaining under PERA. See *Detroit Police Officers Ass'n*, 391 Mich at 58; *Detroit Police Officers Ass'n*, 212 Mich App at 389-390. However, I agree with respondents and conclude that the actuarial assumptions the commission uses to ensure that optional forms of benefit payments are the actuarial equivalent of the bargained primary straight-life retirement benefit are *not* mandatory topics of bargaining within the meaning of "wages, hours, and other terms and conditions of employment" under MCL 423.215(1).

PERA extends its duty to bargain in good faith over "wages, hours, and other terms and conditions of employment," MCL 423.215(1), to public employers "or an officer or agent of a public employer," MCL 423.210(1). PERA does not define "public employer," but it may be inferred from the definition of "public employee," MCL 423.201(e), that "public employer" includes the government of this state, the government of one of its political subdivisions, or boards, commissions, public school districts or any other branch of the public service that appoint or employ persons. The general characteristics of employers are "(1) that they select and

engage the employee; (2) that they pay the wages; (3) that they have the power of dismissal; and (4) that they have power and control over the employee's conduct." *Saginaw Stage Employees, Local 35, IATSE v City of Saginaw*, 150 Mich App 132, 134-135; 387 NW2d 859 (1986). Consequently, the retirement commission is not the public employer of the charging parties' members, so the commission has no duty to bargain with the charging parties regarding terms and conditions of employment unless the commission acts as the agent of respondents.

An "agent" is "'a person having express or implied authority to represent or act on behalf of another person, who is called his principal.'" *Stephenson v Golden*, 279 Mich 710, 734; 276 NW 849 (1937), quoting Bowstead, Agency (4th ed), p 1. Similarly, Black's Law Dictionary (8th ed) defines "agent" as "[o]ne who is authorized to act for or in place of another[.]" On the other hand, a trustee is not an agent. "'An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another.'" *Bankers Trust Co of Detroit v Russell*, 263 Mich 677, 682; 249 NW 27 (1933), quoting *Taylor v Davis' Administratrix*, 110 US 330, 334-335; 4 S Ct 147; 28 L Ed 163 (1884).

The facts and law in this case establish that the retirement commission is a trustee, not an agent. "If a county establishes a plan for the payment of pension and retirement benefits to its employees pursuant to this section, the county board of commissioners may provide for a board of trustees to administer the plan and for the manner of election or appointment of the members of the board of trustees." MCL 46.12a(12). The retirement ordinance creates and vests the retirement commission with "the general administration, management and responsibility for the proper operation of the Retirement System, and for construing and making effective the provisions of this Ordinance." Macomb County Employees' Retirement System Ordinance, § 3. It is undisputed that the commission has never represented respondents in its bargaining with the charging parties; respondents have not authorized the commission to bargain on their behalf with representatives of their employees. Thus, as respondents argue, they cannot directly control decisions made by the commission. But neither may respondents avoid *their* duty to bargain in good faith on this basis *if* the actuarial assumptions at issue are mandatory subjects of bargaining under PERA.

I also conclude that the hearing referee properly rejected respondents' policy argument on the basis of MCL 46.12a(11), which requires that if the county establishes a pension plan, it "shall establish and maintain reserves on an actuarial basis in the manner provided in this subsection sufficient to finance the pension and retirement and death benefit liabilities under the plan and sufficient to pay the pension and retirement and death benefits as they become due." The hearing referee distinguished actuarial assumptions used to determine whether the retirement system is adequately funded, which are not the subject of bargaining, *Bd of Trustees of the Policemen and Firemen Retirement Sys of Detroit v Detroit*, 270 Mich App 74; 714 NW2d 658 (2006), from those used to calculate pension benefits with survivorship rights.

Even though I reject respondents' arguments regarding their lack of control and based on MCL 46.12a(11), I conclude that other reasons support a finding that actuarial assumptions necessary to ensure that optional forms of pension benefits are the "actuarial equivalent" of bargained straight-life retirement benefits are not mandatory subjects of bargaining under PERA. I believe these reasons justify finding that the retirement commission has the responsibility under

state law, as well as the retirement ordinance and the CBAs, to ensure that optional forms of pension benefits payable to similarly situated retirees are "actuarial equivalent." I disagree with the MERC and the majority that the term "actuarial equivalent" might be ambiguous because it is not defined in either the retirement ordinance or state law. A term in a statute or contract is not rendered ambiguous because it is undefined. Rather, words are construed according to their plain and ordinary meaning, with consultation of a dictionary if necessary, unless it is clear a term is a legal term of art having peculiar meaning. *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008); *Terrien v Zwit*, 467 Mich 56, 76; 648 NW2d 602 (2002).

The *Random House Webster's College Dictionary* (1997) defines the root word "actuary" as "a person who computes insurance premium rates, dividends, risks, etc., based on statistical data." It also defines "equivalence" as "the state or fact of being equivalent; equality in value, force, significance, etc." In the context of the CBAs and the retirement ordinance, which plainly require that optional retirement benefits payable over the life of a retiree and a surviving beneficiary be the "actuarial equivalent" of the retiree's straight-life retirement allowance, these definitions require that "actuarial equivalent" mean that optional benefits that include payments to a survivor be equal in value to the straight-life benefit on the basis of statistical data regarding mortality and other factors such as the rate of interest. This meaning of "actuarial equivalent" is consistent with the evidence presented at the hearing before the hearing referee, who concluded, despite some obfuscating testimony by the charging parties' expert, that "[b]oth [Gabriel, Roeder and Smith (GRS), the commission's actuary], from the evidence of its reports, and the UAW's expert witness appear to agree that the precise definition of 'actuarially equivalent' is 'equal based on the same set of actuarial assumptions.'" The retirement system's December 2003 annual actuarial valuation, which was admitted at the MERC hearing below, also defined "actuarial equivalent" as "[a] single amount or series of amounts of equal value to another single amount or series of amounts, computed on the basis of the rate(s) of interest and mortality tables used by the plan." Similarly, the Attorney General opined that the meaning of "actuarial equivalent" in MCL 46.12a(1)(b) requires "receipt of benefits of equal value, and not approximate value, with reference to those benefits enjoyed by other retirants . . . ." OAG, 1981-1982, No 5846 p 32 (January 22, 1981). So, requiring that optional retirement benefits payable over the life of a retiree and a surviving beneficiary be "actuarial equivalent" to that of the retiree's straight-life retirement allowance means that optional retirement benefits be equivalent or equal in value on the basis of actuarial assumptions.

It is undisputed that using 100 percent female mortality tables to calculate "actuarial equivalent" optional retirement benefits payable over the life of a retiree and a surviving beneficiary results in the optional benefits being more valuable than the straight-life benefit. This inequality is contrary to the plain terms of the CBAs and the retirement ordinance. It also results in the retirement system's paying more benefits than are provided for in the CBAs and the retirement ordinance and, in turn, makes it more difficult for respondents to satisfy their obligation to maintain the financial stability of the retirement system. Moreover, rather than achieving sex neutrality in pension benefits and obligations, using 100 percent female mortality tables disproportionately favors male retirees.

The retirement commission in 2006, pursuant to § 15 of the ordinance,[1] selected a true sex-blended mortality table that reflected the actual experience of the retirement system. The 2006 GRS experience study determined that using 60 percent male and 40 percent female blended mortality tables would provide actuarial equivalence between a straight life benefit and optional benefits with rights to a surviving beneficiary. The 60% male/40% female ratio reflected the actual experience of county retirees selecting the more valuable optional benefits despite the fact that the county work force is 74 percent female and 24 percent male. These ratios may reflect that when ready to retire, females are less likely to have someone in whom they have an insurable interest who may be nominated as a survivor or they may reflect the fact that females are less likely to need or desire to provide benefits to a survivor. If bargaining regarding mortality tables and other assumptions used to calculate equality of value is allowed, it would permit continued disparity of value between optional retirement and straight-life benefits. Indeed, bargaining increases the likelihood that optional benefits will continue to differ in value from the defined straight-life benefit.

I read state legislation enabling county retirement systems such as the one at issue here as implicitly, if not explicitly, requiring that optional forms of retirement benefits available to similarly situated retirees be "actuarially equivalent" and that the determination of actuarial assumptions on the basis of the statistical experience of the retirement system is vested in the system's board of trustees, here the retirement commission. MCL 46.12a(1)(b) provides in pertinent part: "A plan adopted for the payment of retirement benefits or a pension shall grant benefits to an employee eligible for pension or retirement benefits according to *a uniform scale for all persons in the same general class or classification*." (Emphasis added). I conclude that permitting an optional retirement benefit with rights of survivorship that is more valuable than a straight-life benefit violates the rule of uniformity "for all persons in the same general class or classification."

In addition, MCL 46.12a(12) provides that a county retirement plan "may provide for a board of trustees to administer the plan and . . . may grant authority to the board of trustees to fully administer and operate the plan . . . within the limitations . . . in the plan." This subsection also provides that the county retirement plan

> may provide for financing, funding, and the payment of benefits in the same manner and to the same extent as is provided for in the state employees' retirement act, 1943 PA 240, MCL 38.1 to 38.69, and the municipal employees retirement act of 1984, 1984 PA 427, MCL 38.1501 to 38.1555 . . . . [*Id*.]

The State Employees' Retirement Act (SERA) vests the state retirement board with the obligation and authority to conduct an actuarial investigation at least once every five years:

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[1] "The Retirement Commission shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15.

> At least once in each 5 year period, the retirement board shall cause an actuarial investigation to be made into the mortality, service, compensation, and other experience of the members and beneficiaries of the retirement system. Upon the basis of such actuarial investigation the retirement board shall adopt such tables as are deemed necessary for the proper operation of the retirement system and for making effective the provisions of this act. [MCL 38.7.]

SERA, like the retirement ordinance here, offers optional retirement benefits that include survivorship rights to a beneficiary provided they are the "actuarial equivalent" of the straight-life benefit. MCL 38.31(1). Although MCL 38.49(8) specifies an assumed interest rate and use of "the 1983 group annuity and mortality table" for the purpose of determining actuarial equivalence for certain optional retirement benefits, SERA does not suggest that the authority vested in the state retirement board to ensure that optional benefits are the actuarial equivalent of the regular straight-life retirement allowance is subject to collective bargaining under PERA. Reading MCL 46.12a(1)(b) and MCL 46.12a(12) in light of SERA, I believe that the Legislature intended that county retirement plans require optional benefits with rights of survivorship be the actuarial equivalent of straight-life benefits determined by bargained factors and that the determination of mortality tables and other actuarial assumptions to maintain actuarial equivalence be vested with the retirement commission.

This conclusion is consistent with caselaw holding "that pension and retirement provisions are mandatory subjects of bargaining" under PERA. *Detroit Police Officers Ass'n*, 391 Mich at 63-64. The parties have bargained and will continue to bargain over formulas for determining eligibility for retirement and for calculating pension benefits on the basis of age, years of service, final average compensation, and other factors. The parties have bargained and will continue to bargain over the availability of optional forms of benefit payments that may include payments to a surviving beneficiary. The only matter within the discretion of the retirement commission is the determination of mortality tables and actuarial assumptions, on the basis of the actual experience of the retirement system's members and beneficiaries, so that optional benefits remain the "actuarial equivalent" of each other. This will also ensure that regardless of which pension benefit similarly situated retirees select, retirement benefits will be paid "according to a uniform scale for all persons in the same general class or classification." MCL 46.12a(1)(b).

B. MORTALITY TABLES ARE "COVERED BY" THE PARTIES' AGREEMENTS

To the extent that the mortality tables and the actuarial assumptions the retirement commission uses to determine actuarial equivalence of optional pension benefits are mandatory topics of collective bargaining, the matter is "covered by" the parties' CBAs. Consequently, respondents satisfied their duty of good-faith bargaining.

Under §15 of PERA, MCL 423.215(1), a public employer has a duty to bargain in good faith over subjects found within the scope of the phrase "wages, hours, and other terms and conditions of employment." See *Detroit Police Officers Ass'n*, 391 Mich at 54. I agree that, generally, retirement or pension benefits and methods of calculating them are mandatory subjects of collective bargaining. *Id*. at 63-64; *Lieutenants & Sergeants Ass'n v City of Riverview*, 111 Mich App 158, 161; 314 NW2d 463 (1981). A public employer commits an unfair labor practice

if it refuses to bargain in good faith regarding a mandatory subject of collective bargaining or takes unilateral action on the subject absent an impasse in the negotiations. MCL 423.210(1)(e); *Detroit Police Officers Ass'n*, 391 Mich at 54-55. A public employer also "commits an unfair labor practice if, before bargaining, it unilaterally alters or modifies a term or condition of employment, unless the employer has fulfilled its statutory obligation or has been freed from it." *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 317; 550 NW2d 228 (1996). An employer satisfies its duty by bargaining about a subject and "memorializing resolution of that subject in the collective bargaining agreement" or by establishing that "the union has waived its right to demand bargaining." *Id*. at 318.

Assuming that mortality tables and other actuarial assumptions are subject to mandatory bargaining, and because respondents do not assert that the charging parties waived their right to bargain, the question presented is whether the matter the charging parties assert should be negotiated is "covered by" or is "contained in" the CBAs. *Port Huron Ed Ass'n*, 452 Mich at 318, citing *Dep't of Navy v Fed Labor Relations Auth*, 295 US App DC 239, 247; 962 F2d 48 (1992). When a matter is "covered by" a CBA, whether the union has waived its rights is irrelevant. *Port Huron Ed Ass'n*, 452 Mich at 319; *Dep't of Navy*, 295 US App DC at 248. Thus, when analyzing an ULP charge, the first step is to determine if the parties' CBA "covers" the matter in dispute. *Port Huron Ed Ass'n*, 452 Mich at 321. If the disputed matter is "covered" by the CBA, "the details and enforceability of the provision are left to arbitration." *Id*. A matter can be "covered by" by a CBA without the matter being explicitly mentioned. *Id*. at 322 n 16.

In this case, all the CBAs provide formulas for determining eligibility for retirement and for calculating pension benefits on the basis of age, years of service, final average compensation, and other factors. All except the AFSCME Local 893 CBA recognize that the retirement benefit an employee may earn is a defined benefit for the life of the retiree but that an actuarial equivalent reduced benefit payable over the joint lives of the retiree and a beneficiary is available under the county retirement ordinance. Further, the parties' agreements incorporate the retirement ordinance by providing that the employer "shall continue the benefits as provided by the presently constituted . . . Ordinance, and the Employer and the employee shall abide by the terms and conditions thereof . . . ." Apparently then, the parties have agreed that the retirement benefit employees may earn is a straight-life benefit under § 22 of the ordinance or an actuarial equivalent reduced benefit payable over the joint lives of the retiree and a beneficiary under § 26. Moreover, by agreeing to be bound by the retirement ordinance, the parties have also agreed that the retirement commission "shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15. Consequently, retirement benefits and the methods used to calculate them—including mortality tables and actuarial assumptions—are "covered by" the parties' CBAs. Respondents have therefore satisfied their duty of bargaining in good faith over retirement benefits. *Port Huron Ed Ass'n*, 452 Mich at 322; *Detroit Police Officers Ass'n*, 391 Mich at 55.

This analysis also applies to the CBA between the Macomb County Road Commission and Local 893. That agreement refers to the retirement ordinance and benefit options for spouses. Because a subject is not comprehensively addressed in the CBA does not mean it is not

"covered by" it. *Gogebic Community College Michigan Ed Support Personnel Ass'n v Gogebic Community College*, 246 Mich App 342, 350; 632 NW2d 517 (2001).

This analysis is also unaffected by the fact that the term "actuarial equivalent" is not defined in either the retirement ordinance or the CBAs. As previously discussed, the term is not ambiguous in the context of pension benefits. Moreover, to the extent the charging parties believe anything in the CBAs or the retirement ordinance requires the continued use of mortality tables and actuarial assumptions adopted in 1982, they have a readily available contract remedy. "If the term or condition in dispute is 'covered' by the agreement, the details and enforceability of the provision are left to arbitration." *Port Huron Ed Ass'n*, 452 Mich at 321.

Consequently, even assuming that mandatory bargaining applies, I conclude that respondents have satisfied their duty to do so in good faith because retirement benefits and methods of calculating them are "covered by" the parties' CBAs. Respondents are not guilty of violating MCL 423.210(1)(e), and the ULP charges should have been dismissed.

C. THE PARTIES DID NOT TACITLY AMEND THE CBAS

I respectfully disagree with the majority that there was sufficient evidence to find that the parties by past practice have amended their CBAs to remove from the retirement commission the discretion to adopt "from time to time . . . such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15. I would reverse the decision of the MERC and vacate its order because its findings are not supported by competent, material, and substantial evidence on the whole record and its holding that the clear and unambiguous language of the parties' contracts was tacitly amended constitutes a substantial and material error of law. First, the MERC erred by finding that the parties' CBAs were ambiguous. Second, the MERC erred by applying the wrong legal standard to determine that the parties tacitly amended their CBAs by lengthy acquiescence to the retirement commission's use of 100 percent female mortality tables for the purpose of determining that optional retirement benefits were the actuarially equivalent of a straight-life benefit.

By finding that the parties tacitly amended their CBAs, the MERC must necessarily have found an ambiguity in the parties' CBAs because a past practice of the parties cannot tacitly amend unambiguous terms of the parties' agreement to the contrary. *Port Huron Ed Ass'n*, 452 Mich at 325-326; *Gogebic Community College*, 246 Mich App 352. The MERC erroneously applied the tacit amendment standard of *Amalgamated Transit Union*, 437 Mich at 454-455. As later explained in *Port Huron Ed Ass'n*, 452 Mich at 325, this standard only applies "[w]here the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed . . . ." A higher standard must be employed with respect to the unambiguous terms of a CBA in order to facilitate the primary purpose of PERA: promotion of "collective bargaining to reduce labor-management strife." *Id*. at 326. To require a party to return to the bargaining table about a matter clearly set forth in a contract requires proof that the parties "knowingly, voluntarily, and mutually agreed to new obligations." *Id*. at 327. The proof necessary to meet this higher standard must be "'clear and unmistakable'" and "'substantially stronger evidence than when utilized to interpret ambiguous language or to fill in areas where the contract is silent.'" *Port Huron Ed Ass'n*, 452 Mich at 327-328 (citations omitted). The

"'highest quantum of proof will ordinarily be required in order to show that the parties intended by their conduct to amend or modify clear and unambiguous contractual language . . . .'" *Id*. at 329 (citation omitted). Under this higher standard, that "a party 'knew or should have known' it was acting contrary to the agreement is insufficient to overcome express language of the agreement." *Port Huron Ed Ass'n*, 452 Mich at 332.

Although an ambiguity or the failure of a CBA to "cover" a topic is necessary to apply the tacit amendment standard, i*d*. at 327-330, the MERC did not clearly state what parts of the CBAs are ambiguous. The MERC suggested that the term "actuarial equivalent" is ambiguous by noting the term is not defined in the retirement ordinance. This term appears in both the CBAs and the retirement ordinance, and as discussed already, is not ambiguous. In the context of the CBAs and the retirement ordinance, the term means that the optional benefits be equal in value to the straight-life benefit on the basis of statistical data regarding mortality. Moreover, the issue in this case is not the meaning of "actuarial equivalent," but how or who determines the mortality tables and other actuarial assumptions by which actuarial equivalence is established. On this pertinent question there is no ambiguity in either the CBAs or the retirement ordinance. The parties in all but one of the CBAs explicitly agreed to be bound by the terms of the retirement ordinance. The one exception, the agreement between the road commission and AFSCME Local 893, implicitly, if not explicitly, deferred to the retirement ordinance as governing optional retirement benefits, and hence the meaning of "actuarial equivalent." The retirement ordinance clearly and unambiguously declares that the retirement commission "is vested [with] the general administration, management and responsibility for the proper operation of the Retirement System, and for construing and making effective the provisions of this Ordinance." Macomb County Retirement Ordinance, § 3. Moreover, the retirement ordinance unambiguously provides that the retirement commission "shall from time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary in the Retirement System on an actuarial basis." Macomb County Retirement Ordinance, § 15.

The retirement commission's long use of a 100 percent female mortality table to determine that optional retirement benefits were the actuarial equivalent of a straight-life benefit is not the clear and unmistakable evidence necessary to overcome the clear and unambiguous terms of the parties' CBAs and the retirement ordinance. On the contrary, it is evidence confirming the plain terms of the CBAs and the retirement ordinance that vests the authority in the commission to from "time to time adopt such mortality and other tables of experience, and a rate or rates of regular interest, as are necessary . . . ." It also does not evidence that the "parties knowingly, voluntarily, and mutually agreed" to amend the CBAs. Similarly, the long time overpayment of optional benefits that were not "the 'actuarial equivalent' of straight life pensions" cannot overcome the express language of the CBAs and the retirement ordinance that vests the authority in the commission to adopt mortality tables and rates of interest as necessary on an actuarial basis. Even if the parties knew or should have known that the use of 100 percent female mortality tables resulted in optional benefits being more valuable than straight-life

benefits, that knowledge was not enough to amend the parties' agreements.[2] "Simply because a party 'knew or should have known' it was acting contrary to the agreement is insufficient to overcome express language of the agreement." *Port Huron Ed Ass'n*, 452 Mich at 332.

II. CONCLUSION

I would hold that the retirement commission is vested with the authority to determine mortality tables and actuarial assumptions necessary to ensure "actuarial equivalence" of optional and straight-life retirement benefits and that this matter is not a mandatory subject of bargaining under PERA. But even if mortality tables and actuarial assumptions were mandatory subjects of bargaining, I would conclude for the reasons discussed in part I(B) that respondents satisfied their duty of good-faith bargaining because retirement benefits and methods of calculating them were "covered by" the parties' CBAs.

Finally, for the reasons discussed in part I(C), I would also reverse the MERC's decision and order because it is not supported by competent, material, and substantial evidence on the whole record and its holding that the clear and unambiguous language of the parties' contracts was tacitly amended constitutes a substantial and material error of law. I would, therefore, reverse the MERC's decision, vacate its order, and remand this matter for entry of an order dismissing the charging parties' unfair labor practice charges under MCL 423.210(1)(e).

/s/ Jane E. Markey

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[2] Because the retirement commission is not an agent of respondents, the commission's 1982 action cannot be evidence of respondents' intent to "knowingly, voluntarily, and mutually" amend the CBAs. Likewise, the 1982 GRS report cannot establish respondents' intent. Moreover, adding the language "[f]or purposes of determining actuarial equivalent Retirement Allowances, the Retirement Commission is currently using a 7½% interest rate and a blending of male and female rates based on the 1971 group annuity mortality table projected to 1984 with ages set back two years" to § 15 of the ordinance does not limit the preceding sentence of that section. Further, the retirement commission did not adopt a sex-blended mortality table until 2006. At best, the evidence the majority relies on would only support a finding that respondents knew or should have known that using the 100 percent female mortality tables would result in optional retirement benefits that were not the actuarial equivalent of a straight-life benefit. That knowledge is insufficient to amend the clear and unambiguous language of the parties' agreements. *Port Huron Ed Ass'n*, 452 Mich at 332.